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UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

Memorandum

Date: September 24, 2001

TO: The Commission
Todd A. Stevenson, Acting Secretary

FROM: Michael S. Solender, General Counsel AZS for
Seth B. Popkin, Trial Attorney, Legal Division, Office of Compliance SBP

SUBJECT: Star ME-1 Fire Sprinkler Staff Recommendation for Issuance of Administrative Complaint: Federal Court Ruling and Order in *Grucon Corporation v. Consumer Product Safety Commission*

On September 19, 2001, in *Grucon Corporation v. Consumer Product Safety Commission*, the U.S. District Court for the Eastern District of Wisconsin entered a Judgment Order granting the Motion to Dismiss filed by the Consumer Product Safety Commission ("Commission") and dismissing the case. For your reference, we have attached a copy of the court's Judgment and its Decision and Order.

Grucon Corporation ("Grucon") brought the case asking the court to declare that Grucon and its subsidiary are separate corporate entities and that the Commission cannot seek a corrective action plan from Grucon. The court ruled that the Commission staff's actions to date do not constitute final agency action under the law and that, as a result, judcial review is premature. The court noted that Grucon will have ample opportunity during the administrative process to address whether or not it should be held responsible for the sprinklers.

If you have any questions, please contact me. Thank you for your attention to this matter.

Attachments

cc: Caroline Croft, Executive Director
Alan H. Schoem, Assistant Executive Director, Office of Compliance
Eric L. Stone, Director, Legal Division, Office of Compliance

NOTE: This document has not been reviewed or accepted by the Commission.
Initial [illegible] Date 9/24/01

CPSA 6 (b)(1) Cleared 9-24-01
X No Mfrs/PrvtLblrs or Products Identified

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

EASTERN DISTRICT OF WISCONSIN

GRUCON CORPORATION,
Plaintiff,

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Defendant.

JUDGMENT IN A CIVIL CASE

Case No. 01-C-157

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came before the Court for consideration.

IT IS HEREBY ORDERED AND ADJUDGED that defendant's motion to dismiss be and hereby is granted.

IT IS FURTHER ORDERED that this action be and hereby is dismissed without prejudice.

Approved: William E Callahan
WILLIAM E. CALLAHAN, JR.
United States Magistrate Judge

Dated this 19th day of September 2001, at Milwaukee, Wisconsin.

SOFRON B. NEDILSKY
Clerk

(By) Deputy Clerk

Copy mailed to attorneys for parties by the Court pursuant to Rule 77 (d) Federal Rules of Civil Procedures.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

GRUCON CORPORATION,

Plaintiff,

v. Case No. 01-C-0157

CONSUMER PRODUCT SAFETY COMMISSION,

Defendant.

DECISION AND ORDER

The plaintiff, Grucon Corporation ("Grucon"), filed this action seeking declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, against the defendant, the Consumer Product Safety Commission ("CPSC"), and challenging the CPSC's actions with respect to its investigation of sprinklers manufactured by Star Sprinkler Corporation (now known as Sprinkler Company of Milwaukee) between 1983 and 1996. Grucon asks the court to declare that "Grucon and Sprinkler Company of Milwaukee are and at all times relevant to this action, were separate and distinct corporate entities" and "[t]hat in light of the corporate separateness, the CPSC cannot seek a corrective action plan from Grucon." (Compl. at 4-5 ¶¶ A and B). Defendants now move to dismiss the action pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, arguing that, because the actions Grucon challenges do not constitute "final agency action," this court lacks subject matter jurisdiction over Grucon's claims. For the reasons set forth below, this action is

dismissed. Moreover, because the court is satisfied that the defects in jurisdiction are incurable, no leave will be granted to file an amended complaint stating new jurisdictional grounds.

I. BACKGROUND

From 1984 to 1996, the former Star Sprinkler Company ("Star"), manufactured a fire protection sprinkler head called the Star ME-1. (Compl. ¶¶ 3, 6). The ME-1, a specialized "dry pendant" sprinkler, was among various similar sprinkler models that the CPSC investigated with respect to their ability to perform safely in fire conditions. The CPSC alleges that, during this investigation, it developed evidence adequate to support a preliminary finding that the Star ME-1 sprinklers present a substantial risk of injury to the public. *See* Consumer Product Safety Act ("CPSA"), 15 U.S.C.§ 2064(a) (defining substantial product hazard).

In 1996, Star sold all of its assets, including its name, to a competitor, Grinnell Corporation, and disbursed the proceeds of the sale to its sole shareholder, plaintiff Grucon. (Compl. ¶¶ 8, 10). As a consequence of the sale, Star ceased all business operations and changed its name to Sprinkler Company of Milwaukee ("SCM"). (Compl. ¶ 8). SCM has never transacted any business and has no assets. (Compl. ¶ 9).

In letters dated June 16, 2000, November 30, 2000 and May 9, 2001, the CPSC informed Grucon of its findings with respect to the ME-1 sprinklers and provided a summary of the evidence that it believes illustrates that the ME-1 sprinklers present a "substantial product hazard" under the CPSA. The correspondence also advised Grucon that the CPSC had made a preliminary determination, based on its current information, that Grucon bears the responsibility for the defective sprinklers manufactured by Star from 1983 to 1996 and requested that Grucon undertake voluntary corrective action with respect to those sprinklers. The CPSC further advised Grucon

of the procedural steps that lay ahead if Grucon failed to submit a corrective action plan within the time frame given it. The CPSC explained that its staff would submit the matter to a preliminary determination panel, which it anticipated would make a preliminary finding that the Star ME-1 sprinklers present a substantial product safety hazard as defined by the CPSA. As a result of that preliminary determination, the CPSC stated it would then notify Grucon of the finding and submit a recommendation to the Commission that the staff be authorized to file an administrative complaint seeking to compel corrective action with respect to the ME-1 sprinklers. If the recommendation were subsequently accepted by the Commission, the complaint would compel corrective action and be enforceable by the CPSC through litigation.

Although the CPSC requested that Grucon submit a corrective action plan describing its proposed actions to remedy the alleged sprinkler defect, Grucon, in a letter to the CPSC declined to submit a corrective action plan. *See* 16 C.F.R. § 1115.20(a) (defining corrective action plan and setting forth the requirements and elements of such a plan).

Before the CPSC had the opportunity to take further action with respect to its findings regarding the ME-1 sprinklers, Grucon filed this action on February 14, 2001 alleging that litigation by the CPSC was imminent and seeking a declaratory judgment that Grucon and Star are, and were at all times material, separate and distinct corporate entities, and that the CPSC thus may not seek a corrective action plan from Grucon. Following the initiation of this law suit, the filing of the CPSC's motion to dismiss, and the submission of the parties' briefs on the issues raised by the motion to dismiss, the CPSC staff, on September 4, 2001, informed Grucon that the staff was transmitting a draft complaint to the Commission seeking a ruling that the CPSC staff be authorized to issue a complaint and compel corrective action from Grucon. That recommendation

and draft complaint are now pending before the Commission, which has not yet rendered a decision.

The parties have consented to United State magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c) and Local Rule 73.1 (E.D. Wis.). Venue is proper pursuant to 28 U.S.C. § 1391. In April, the CPSC filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). This motion is now fully briefed and is ready for resolution.

II. ANALYSIS

A. Standard of review for Rule 12(b)(1) motion to dismiss

The CPSC has filed a motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction. Because the federal courts have limited jurisdiction, they only have the power to hear a case if that power is granted by the Constitution and authorized by statute. *Waldron v. Pierre,* 995 F. Supp. 935, 936 (N.D. Ill. 1998). The presumption is that a cause of action lies outside of the limited jurisdiction of the federal courts. *Id.* Once the existence of subject matter jurisdiction is questioned, it is the plaintiff's burden to establish that all jurisdictional requirements have been met. *See Kontos v. U.S. Dep't of Labor*, 826 F.2d 573, 576 (7th Cir. 1987). However, when ruling on a motion to dismiss for lack of subject matter jurisdiction, this court must accept all of the complaint's well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the plaintiff's favor. *Waldron,* 995 F. Supp. at 936. Additionally, it is proper for the court to look beyond the jurisdictional allegations in the complaint and to view whatever evidence has been submitted in response to the motion, including affidavits and testimony. *Sprague v. King*, 825 F. Supp. 1324,

1329 (N.D. Ill. 1993); Fed. R. Civ. P. 12(b)(1).

Thus, a district court may consider more defenses than necessary to rule on the motion to dismiss. *See, e.g., GTE North Inc. v. McCarty*, 978 F.Supp. 827 (N.D. Ind. 1997) (discussing multiple issues raised by a 12(b)(1) motion). At the same time, however, the court must avoid deciding Constitutional issues where the matter may be resolved on a statutory or prudential basis. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Only once all jurisdictional issues are resolved in favor of jurisdiction may the court proceed to remaining issues. *Crawford v. United States*, 796 F.2d 924, 929 (7th Cir. 1986) ("[O]nce the district judge has reason to believe that there is a serious jurisdictional issue, he is obliged to resolve it before proceeding to the merits even if the defendant, whether as a matter of indolence or strategy, does not press the issue.") This court, therefore, gives priority consideration to identifying and answering non-Constitutional questions of jurisdiction.

B. Jurisdictional issues

The CPSC's principal argument in its motion to dismiss for lack of subject matter jurisdiction is that its position with respect to Grucon and the ME-1 sprinklers remains in an investigatory stage and that formal administrative proceedings have not yet been initiated.[1] Thus, in the CPSC's view, there has been no "final agency action" as required by the Procedure Act ("APA"), 5 U.S.C. §§ 702-04, for nonstatutory judicial review of agency decisions. The CPSC also challenges Grucon's proof on a number of other elements which much

[1] Since the time that the CPSC submitted its arguments to the court, the CPSC staff has initiated the administrative process by submitting a draft complaint to the Commission seeking authority to issue a complaint against Grucon. That recommendation is pending before the Commission. Ultimately, however, this action makes no difference in the outcome of the court's decision.

be assembled by a party wishing to sue the federal government in district court over an administrative action. The CPSC challenges, at least in passing, Grucon's showing (1) that some general or specific statute grants jurisdiction to the district court; (2) that the prayed for relief is within the court's power to grant; (3) that the cause of action it advances is recognized in the law; and (4) that Congress has waived sovereign immunity. Finally, the CPSC argues that Grucon has stated no justiciable case or controversy under Article III of the United States Constitution.

1. Statutory basis of jurisdiction and form of relief

Grucon alleges jurisdiction pursuant to 28 U.S.C. § 1346, governing actions in which the United States is a defendant. (Compl. ¶ 1). Although Grucon does not identify the subsection of 1346 that it argues creates subject matter jurisdiction, Grucon most likely is seeking to establish jurisdiction under the Tucker Act, whose jurisdictional provision is codified at 28 U.S.C. § 1346(a)(2). The Tucker Act governs actions "against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1346(a)(2). However, the Tucker Act only "empowers district courts to award damages but not to grant injunctive or declaratory relief." *Lee v. Thornton*, 420 U.S. 139, 140 (1975).

Grucon attempts to circumvent this limitation on jurisdiction under the Tucker Act by appealing to the Declaratory Judgment Act, 28 U.S.C. § 2201, from which district courts derive a general power to grant declaratory relief. But, the Declaratory Judgment Act is a procedural act that merely grants courts a new, noncoercive remedy in cases where they already have jurisdiction. *American Auto. Ins. Co. v. Freundt*, 103 F.2d 613, 617 (7th Cir. 1939). It is well established that

the Declaratory Judgment Act does not itself confer jurisdiction or extend the jurisdiction of the federal courts. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950).

Nonetheless, Grucon might, at least arguably, be able to succeed in its argument for a statutory basis for jurisdiction if it could fuse the Tucker Act, 28 U.S.C. § 1346(a)(2), with the Declaratory Judgment Act, 28 U.S.C. § 2201, meeting the jurisdictional requirements of section 1346 but getting a license to pursue its remedy from section 2201. This argument was not foreclosed by the decision in *Skelly Oil Company*. As applied therein, the term "'jurisdiction' means the kinds of *issues* which give right of entrance to federal courts," not the form of relief sought. *See Skelly Oil Co.*, 339 U.S. at 671 (emphasis added). Thus, one could argue that this court could find that the Declaratory Judgment Act, although it does not provide a separate jurisdictional basis, opens the door to actions that a federal court would previously not entertain, provided the right issues were present. *Id.*

This argument, however, is unavailing in this case. The Supreme Court has rejected the argument that the Declaratory Judgment Act allows such actions where the Tucker Act would have created jurisdiction for the Court of Claims to hear a case, but for the fact that the relief sought was solely declaratory. *See, e.g., United States v. King*, 395 U.S. 1, 3-4 (1969). And the Tucker Act is understood to permit district courts to hear only cases which could be heard by the Court of Claims. *Richardson v. Morris*, 409 U.S. 464, 465-66 (1973).

Grucon recognizes that its claim of jurisdiction pursuant to 28 U.S.C. § 1346 might succumb to the defendant's challenge, and argues that "to the extent that the Court considers this argument, any deficiency can be remedied by amending Grucon's complaint to arise under [section] 1331, federal question jurisdiction...." (Pl.'s Brief at 11 n.3). The plaintiff's reference to section

1331 does not appear in the complaint, where a sound jurisdictional basis must be stated. *See* Fed. R. Civ. P. 8(a)(1). Although the Supreme Court has said a theory not advanced by the plaintiff "ordinarily" results in dismissal, *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 810 n.6 (1986), the Seventh Circuit has held that dismissal should be used sparingly. *General Ry. Signal Co. v. Corcoran*, 921 F.2d 700, 705 (7th Cir. 1991). Rather than dismissing the case, the court must determine whether jurisdiction exists, and if so, order amendment of the complaint. *Id.* Thus, the court's inquiry now flows to whether there is federal question jurisdiction pursuant to 28 U.S.C. § 1331 in this case.

Grucon proposes that there are two federal questions integral to its case: first, whether the CPSC has the statutory authority to seek a corrective action plan from Grucon or determine its responsibility for the actions of Star, and second, whether Grucon and Star are the same company under federal common law. "In declaratory judgment cases, the well-pleaded complaint rule dictates that jurisdiction is determined by whether federal question jurisdiction would exist over the presumed suit by the declaratory judgment defendant." *GNB Battery Technologies, Inc. v. Gould, Inc.*, 65 F.3d 615, 619 (7th Cir.1995). The alleged "imminent litigation" which Grucon fears would necessarily be based on the Consumer Product Safety Act ("CPSA"), so there is no difficulty establishing that a federal question exists.

Of course, even availing itself of federal question jurisdiction, Grucon still needs the Declaratory Judgment Act to obtain the relief it desires. It should be noted that the Declaratory Judgment Act creates no *right* to relief, but allows a district court to exercise its discretion in granting or denying a prayer for declaratory relief. *Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 241 (1952); *see also Allstate Ins. Co. v. Charneski*, 286 F.2d 238, 244 (7th Cir.

1960) (stating that relief is permissive and not absolute); *Sears, Roebuck & Co. v. American Mut. Liab. Ins. Co.*, 372 F.2d 435, 438 (7th Cir. 1967) (stating that discretionary declaratory relief depends upon whether a declaratory judgment would settle the particular controversy and clarify the legal relations at issue). Because the factors that would guide the court's use of discretion are inextricably tied with the remaining jurisdictional issues in the case, they are discussed below.

2. Substantive Cause of Action and Sovereign Immunity

The CPSC contends that neither the Tucker Act nor the Declaratory Judgement Act creates a substantive cause of action or waives sovereign immunity. (*See* Def's Br. at 6 n.7). The CPSC is correct in its assertions.

The United States, as sovereign, is immune from suit except as it consents to be sued, and the issue of sovereign immunity is jurisdictional. *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *see also United States v. Rural Elec. Convenience Co-op Co.*, 922 F.2d 429, 434 (7th Cir. 1991). The passage of the Declaratory Judgment Act did not provide or create implied consent by the United States to be sued. *Balistrieri v. United States*, 303 F.2d 617, 619 (7th Cir. 1962). Thus, Grucon argues that its action falls within an exception to sovereign immunity. The one argument it makes, however, is without merit.

Grucon characterizes its action as a challenge to the jurisdiction of the CPSC and cites *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949), for the proposition that *ultra vires* actions by government employees fall beyond the sovereign's immunity. An argument analogous to Grucon's, however, was rejected in *Larson* itself. *Larson,* 337 U.S. at 687-89. In *Larson*, the Court recognized that some suits for specific relief are, indeed, beyond the sovereign's immunity because they do not act to bind the sovereign. *Id.* But that exception does not apply here precisely

because a declaratory judgment that did not bind the CPSC would be meaningless. Therefore Grucon has stated no grounds for waiver of sovereign immunity.

With regard to the existence of a substantive cause of action, the only time a failure to identify a cause of action or its statutory basis generates a jurisdictional issue is when such failure renders the complaint so clearly insubstantial or devoid of merit as to preclude a federal controversy. *Oneida Indian Nation of N.Y. State v. County of Oneida*, 414 U.S. 661, 662 (1974). This "patently insubstantial" standard is less demanding than that required to survive a 12(b)(6) motion, more closely resembling the line between frivolous and nonfrivolous motions. *See Yazoo County Indus. Dev. Corp. v. Suthoff*, 454 U.S. 1157, 1161 (Rehnquist, C.J., dissenting from denial of certiorari). As noted above, the Tucker Act, 28 U.S.C. § 1346(a)(2), does not create jurisdiction or provide a cause of action in this case.[2] Moreover, the Declaratory Judgment Act, 28 U.S.C. § 2201, neither expands the court's jurisdiction nor creates any substantive rights. *B. Braun Medical, Inc. v. Abbott Labs.*, 124 F.3d 1419, 1428 (Fed. Cir. 1997).

However, despite its failure to cite it, Grucon has a very strong candidate for a statute creating substantive rights and waiving sovereign immunity in the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702-704. Although the APA is never mentioned in the complaint, the CPSC clearly recognizes and responds to this action as an APA case. And the APA, in fact, both creates

[2] Although the Tucker Act creates no substantive rights enforceable for money damages against the United States, it would waive sovereign immunity. *United States v. Mitchell*, 463 U.S. 206, 216-19 (1983). *Mitchell* explains away an apparently contrary holding regarding sovereign immunity in *United States v. Testan*, 424 U.S. 392, 398 (portion of Tucker Act applying to court of claims does not confer cause of action or waive immunity); *see also Moose v. United States*, 674 F.2d 1277, 1280 n.4 (9th Cir. 1982) (although *Testan* dealt with 28 U.S.C. § 1491 rather then 28 U.S.C. § 1346(a)(2), the reasoning applies with equal force); *Duarte v. United States*, 532 F.2d 850, 851 n.2 (2d Cir. 1976) (same).

a cause of action and waives sovereign immunity in cases meeting its requirements. Without the APA, it does not appear that Grucon can found a claim or escape the defense of sovereign immunity. Thus, this court's jurisdiction depends upon whether Grucon can meet the requirements for APA review.

3. The Administrative Procedure Act

The purpose of the APA is to authorize judicial scrutiny of executive-branch decision-making, creating, subject to exceptions, a "basic presumption of judicial review." *See Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). It thus "confers an action" for injunctive relief on a proper party. *Public Citizen v. Office of U.S. Trade Representatives*, 970 F.2d 916, 918 (D.C.Cir. 1992). In addition, the APA waives sovereign immunity and was amended in 1976 to make this waiver explicit. *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 724 (2d Cir.1983).

The APA permits judicial review of "final agency action for which there is no other adequate remedy in a court" should a party be "adversely affected or aggrieved" by that action. 5 U.S.C. §§ 702, 704. The CPSC directs its main argument to the existence of final agency action, focusing on what it claims is a lack of finality, but also calling into question the very existence of

agency action.[3] The court agrees with the CPSC and concludes that the CPSC's actions do not constitute final agency action within the meaning of the Administrative Procedure Act and, thus, finds that judicial review is premature.

The court's consideration of the application of the finality requirements of the APA necessarily begins with a discussion of the relationship among the doctrines of finality, ripeness, and exhaustion since they "are all implicated when an agency is sued and defends on the ground that the suit is premature because of the nature of the agency action being challenged or the stage of the agency's proceedings." *Jerome Milton, Inc. v. FTC*, 734 F. Supp. 1416, 1419-20 (N.D. Ill. 1990). Several courts have stated that the APA codifies exhaustion. *Darby v. Cisneros*, 509 U.S. 137,153-54 (1993); *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) ("the primary thrust of § 704 [of the APA] was to codify the exhaustion requirement"); *Shawnee Trail Conservancy v. United States Dep't of Agric.*, 222 F.3d 383, 388-89 (7th Cir. 2000). But other courts have found that the APA codifies ripeness. Stephen G. Breyer et al., Administrative Law and Regulatory Policy 954 (4th ed. 1999). At least one scholar has seen the effort to distinguish the three doctrines as pointless. *See* 2 Kenneth C. Davis, Administrative Law Treatise, § 15.17 (1994). In fact, the persisting distinctions can lead to confusing results. *See, e.g.*, *Ticor Title Ins. Co. v. FTC*, 814 F.

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[3] Because the CPSC, since the filing of its brief in support of its motion to dismiss, has acted to file a recommendation and draft complaint with the Commission, the court concludes for purposes of this decision that agency action has been taken. Agency action "includes the whole or part of an agency rule, order, license, sanction, relief or the equivalent or denial thereof, or failure to act." *FTC v. Standard Oil Co.*, 449 U.S. 232, 238 n.7 (1980) (internal citations and punctuation omitted). Order, in turn, is defined as "the whole or part of a final disposition...of an agency in a matter other than rule making." *Id.* The legislative history of the APA states that agency action "includes the supporting procedures, findings, conclusions, or statements or reasons or basis for the action or inaction." *Id.* Thus, since the filing of a recommendation and draft complaint is part of a final disposition, stating grounds for the CPSC's actions, the court finds that the action taken by the CPSC is "agency action" within the meaning of the APA.

2d 731 (D.C. Cir. 1987) (dismissing the case because a challenge to FTC action was premature, one judge concluding that administrative remedies had not been exhausted, one judge concluding that agency action was not final, and a third judge in the three-judge panel concluding that the matter was not ripe for judicial review).

Two circuits have suggested that the finality provisions of the APA are jurisdictional. *DRG Funding Corp. v. Secretary of Hous. and Urban Dev.*, 76 F.3d 1212, 1214 (D.C. Cir. 1996); *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 n.1 (9th Cir. 1990) (finding that finality under the APA is sometimes treated as an aspect of ripeness and sometimes as an independent basis of jurisdiction). The D.C. Circuit distinguishes finality under the APA from ripeness and exhaustion and regards only finality as jurisdictional. *American Train Dispatcher's Ass'n v. ICC*, 949 F.2d 413, 414 (D.C. Cir. 1991); *see also Ticor Title Ins. Co.*, 814 F.2d at 745 (opinion of Williams, J.) (arguing that because finality is jurisdictional, the case must be dismissed on finality basis, rather than on the basis of exhaustion or ripeness). At least one district court in the Seventh Circuit has declared that "[r]ipeness and exhaustion are prudential considerations, with ripeness focusing on the fitness of the issues for judicial review and exhaustion focusing on the steps which the litigant must follow. Finality is a jurisdictional consideration which focuses on the definitiveness and effect of the challenged action." *See Jerome Milton, Inc. v. FTC*, 734 F.Supp. 1416, 1419-20 (N.D.Ill. 1990). Because finality is a jurisdictional issue,[4] the court will discuss finality first. *Id.*

[4] There is some contrary authority as to whether other aspects of the APA are jurisdictional. Although the APA does not provide an independent basis of jurisdiction, *Califano v. Sanders*, 430 U.S. 99 (1977), it is equally well established that it does confer a cause of action and waive sovereign immunity. Because sovereign immunity is a jurisdictional issue, and also because the existence of a cause of action may be jurisdictional, it would seem to follow that the issue of whether the APA applies is, indeed, a jurisdictional one. Yet the Supreme Court has said

The courts have avoided giving a fixed definition or universal test for "final agency action," preferring a flexible and pragmatic construction. *See FTC v. Standard Oil* Co., 449 U.S. 232, 239-40; *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). The finality requirement "is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury...." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985). Some of the relevant factors which make agency action final were articulated in *Standard Oil*, 449 U.S. 232, 239-40 (1980). These factors include: 1) whether the action constitutes a definitive statement of agency position, or merely a threshold determination that further inquiry is warranted; 2) whether the action has a direct and immediate impact on the plaintiff's day-to-day business, or merely requires the plaintiff to respond to the agency adjudicative process; 3) whether the action has the status of law accompanied with an expectation of immediate compliance, or lacks legal impact; and 4) whether judicial review is calculated to speed enforcement, or would instead create inefficiency. *Standard Oil Co.*, 449 U.S. at 239-40.

The mere filing of an administrative complaint generally does not satisfy the finality requirement of the APA. *Id.*; *see also Abbs v. Sullivan*, 963 F.2d 918, 926 (7th Cir. 1992) (stating that final agency action "emphatically does not mean the issuance of the administrative complaint,

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that "[t]he judicial review provisions of the APA are not jurisdictional." *Air Courier Conference of America v. American Postal Workers Union AFL-CIO*, 498 U.S. 517, 523 n.3 (1991) (citing *Califano)*. Even though this view has been cited at least once, *Friedman v. Kantor*, 977 F.Supp. 1242, 1250 n.15 (Ct.Intl.Trade 1997), it was not essential to the disposition of *Air Courier Conference* and the court is skeptical that it was intended to bear any precedential authority, particularly given the Supreme Court's admonishments not to place much weight on what Justice Scalia has called "drive-by" jurisdictional rulings. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998).

kicking off the administrative proceeding.") Additionally, "[b]ecause the filing of a complaint is not definitive, as *Standard Oil* makes clear, a letter warning that such a complaint may be filed cannot be viewed as definitive." *Jerome Milton*, 734 F. Supp. at 1421. Instead, a final agency action must "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Ash Creek Mining Co. v. Lujan*, 934 F.2d 240 (10th Cir. 1991).

If we consider the agency action in the present case to be the initiation of an investigation of Grucon for Star's allegedly defective sprinklers, and the subsequent filing of a recommendation by the CPSC staff that an administrative complaint be issued against Grucon, then the application of the *Standard Oil Company* criteria shows that the agency action in this case is not final. First, the CPSC's correspondence with Grucon evinces only the kind of preliminary determination which the Supreme Court regarded in *Standard Oil* as non-final. Because the Commission must still review the recommendation of the CPSC staff, accept or reject that recommendation, and participate in any subsequent administrative proceedings, there has not yet been a definitive statement of agency position. Second, Grucon has not alleged any impact on its day-to-day business other than having to defend itself in agency proceedings. The burden of appearing and defending oneself in agency proceedings, including the prospective expense of litigation, does not constitute the type of direct and immediate adverse effect necessary for agency action to be final. *Standard Oil*, 449 U.S. at 244; *Jerome Milton*, 734 F. Supp. at 1422; *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 (9th Cir. 1990). Third, there is no indication that the action taken by the CPSC staff in filing a recommendation with the Commission has, in any way, the status of law. Indeed, because the Commission could decide not to issue the complaint, there is certainly no expectation of immediate compliance with the draft complaint. And, finally, there is at least a

serious question whether there would be any justification for interfering with the agency's normal process of adjudication, during which it would hear evidence and reach its own determination regarding Grucon's responsibility for the allegedly defective sprinklers as the alter ego of Star.

Grucon alleges that an "exception" to the finality requirements of the APA applies in certain cases "where the challenge is unrelated to the merits of the dispute, but rather concerns the very assertion of agency jurisdiction or authority or the procedures utilized by the agency." *Jerome Milton*, 734 F.Supp. at 1423. In this regard Grucon claims that it is not seeking judicial review of the underlying merits of the action taken against it by the CPSC, but instead states that it is "challenging the CPSC's jurisdiction over a non-manufacturer, non-distributor, non-retailer." (Pl.'s Resp. Br. at 11). This argument is without merit. As the court in *Jerome Milton* makes clear, the exceptions to the requirements of finality rarely apply. *Jerome Milton*, 734 F. Supp. at 1423. Moreover, in this case, the question whether Grucon should be held responsible for the allegedly defective sprinklers manufactured by Star is inextricably tied to the merits of the case. Grucon will have adequate opportunity during the administrative process to address this issue and, indeed, the CPSC will have to prove that Grucon is a manufacturer, distributor, or retailer of the defective ME-1 sprinklers in order to take enforcement action against it.

Nevertheless, in support of its argument for immediate judicial review Grucon alludes to a small set of D.C. Circuit opinions from the mid-1980s, which includes *Athlone Indus., Inc. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485 (D.C.Cir. 1983); *Atlantic Richfield Co. v. U.S. Dept. of Energy*, 769 F.2d 771 (D.C.Cir.1984); and, although Grucon did not cite it, *Ciba-Geigy Corp. v. U.S. Envt'l Prot. Agency*, 801 F.2d 430 (D.C.Cir.1986). None of these decisions fully address the issue of finality under the APA, focusing instead on resolving issues of exhaustion and

ripeness. However, because the unresolved issue of how the APA relates to the doctrines of finality, ripeness and exhaustion (and their off-on treatment as functional equivalents) leaves open the prospect that Grucon might be free to comb the jurisprudence of the three doctrines to find the most amenable arguments for an exception, the court will briefly discuss exhaustion, ripeness, and the collateral order doctrine in the context of these cases.

In *Athlone Indus. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485 (D.C. Cir. 1983), the court was confronted with a dispute over whether the Federal Trade Commission could assess civil penalties in an administrative proceeding. *Athlone Indus.*, 707 F.2d at 1487. The D.C. Circuit considered the APA and finality in *Athlone Industries* only in a brief footnote, which stated that, merely by filing an administrative complaint, the Commission had taken a definitive position on the issue of its own jurisdiction, distinguishing the case from *Standard Oil* and making that action final with respect to the narrow jurisdictional issue presented. *Id.* at 1489, n.29. As distinguished from the instant case, Athlone did not seek judicial review prior to the initiation of administrative proceedings, but instead raised the issue by motion during the administrative proceedings. Athlone then proceeded to seek relief in federal court after the administrative law judge ruled adversely on its motion. Therefore, in deciding that there was final agency action and in permitting judicial review, the court in *Athlone Industries* relied on more than the letters and recommendation upon which Grucon here relies; simply stated, the agency proceedings in *Athlone Industries* were much more advanced than they are in this case. Finally, the issue presented to the court in *Athlone Industries*, i.e., the CPSC's authority to assess civil penalties in an administrative proceeding, was a purely legal issue, separable from the merits of the underlying action. By contrast, and as previously discussed, Grucon cannot show that the issue of its responsibility for the products

manufactured by Star is separable from the CPSC's underlying claims against it.

Atlantic Richfield Co. ("*ARCO*"), likewise, was not an APA case, but instead addressed issues of exhaustion and ripeness. Its finality analysis again appears only in a footnote, and is specific to a statute other than the APA, i.e., 42 U.S.C. § 7193(c), stating what constitutes "final agency action" by the Federal Energy Regulatory Commission. *Atlantic Richfield*, 769 F.2d at 781, n.63. Additionally, *ARCO* involved proceedings that were far more advanced in the administrative process than the preliminary actions upon which Grucon relies and, like *Athlone Industries*, involved primarily a question of law regarding the general authority of the administrative agency.

Moreover, the language cited by Grucon from *ARCO*, 769 F.2d at 780-81 (Pl's Br. at 8) is, in fact, not discussing finality at all, but exhaustion. Although the court in *ARCO* recognized that "the time and expense of litigation does not normally justify interlocutory review," it set aside such considerations "given the grave questions as to the legality of the Department's procedures, the strong public interest in early resolution of those questions, and the impossibility of finally settling them administratively...." *Atlantic Richfield*, 769 F.2d at 784. Grucon has shown neither that the public will suffer if its weighty concerns regarding the CPSC's jurisdiction over it are not quickly put to rest nor that these concerns cannot be settled within the administrative process.

Finally, *ARCO* recognized an exception to the doctrine of ripeness when (1) an issue is fit for judicial resolution, meaning it is essentially legal and involves sufficiently final agency action; and (2) when withholding review would impose an inequitable hardship on the parties. *See Atlantic Richfield*, 769 F.2d at 783. But, Grucon has not shown either that the issues presented to the court are essentially legal and fit for judicial resolution or that withholding review would impose an

inequitable hardship upon it.

To be sure, a "futility" exception to exhaustion was recognized in both *Athlone Industries* and *Atlantic Richfield Co.* where the following features were present: (1) the issue was one of pure law, involving statutory interpretation, where the opposing parties agreed on the facts; (2) the issue was outside the particular expertise of the agency and would not benefit from either the specialized expertise of the agency or development of the factual record; and finally, (3) that remand was most likely futile.[5] *Athlone Indus.*, 707 F.2d at 1488-89; *Atlantic Richfield*, 769 F.2d at 782. Grucon's showing, however, is not sufficient to provide proof of each of the required elements of the futility exception to exhaustion. Moreover, the Seventh Circuit has not been generous with the futility exception and requires a showing of *certain* rejection of a plaintiff's arguments, not mere doubt. *Smith v. Blue Cross & Blue Shield United of Wisc.*, 959 F.2d 655, 659 (7th Cir. 1992). The evidence that Grucon presents, including the testimony given by a past administrator that the CPSC seldom changes its mind, is plainly insufficient to meet this high burden.

Finally, *Ciba-Geigy v. U.S. Envt'l Prot. Agency*, 801 F.2d 430 (D.C. Cir. 1986), is an APA case which equated the APA's finality requirement with the finality element in a traditional ripeness analysis. The standard that the *Ciba-Geigy* court articulates is not favorable to Grucon:

> The interest in postponing review is powerful when the agency position is tentative. Judicial review at that stage improperly intrudes into the agency's decisionmaking process. It also squanders judicial resources since the challenging party still enjoys an opportunity to convince the agency to change its mind. Once the agency publicly articulates an unequivocal position, however, and expects regulated entities to alter their primary conduct

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[5] Specifically, the futility exception applied in *Athlone Industries* because the agency had made a previous unanimous ruling on the identical issue in another case and the court was concerned with avoiding inconsistent rulings between Athlone and a co-party in another circuit. *Athlone Indus.*, 707 F.2d at 1489.

> to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review.

Ciba-Geigy, 801 F.2d at 436 (citations omitted). Under this standard, the factors balance against permitting immediate judicial review of the matter before this court: Grucon is not required to alter its primary conduct because of the actions of the CPSC, nor has the CPSC issued any public pronouncement or cut off opportunities for Grucon to challenge CPSC jurisdiction in administrative hearings.

Paralleling these exceptions to the finality requirement is the exception to the final judgment rule for collateral orders, which is derived from *Cohen v. Beneficial Indust. Loan Corp.*, 337 U.S. 541 (1949), and was applied to the APA context in *Standard Oil*. The collateral order exception requires an order resolving rights "separable from, and collateral to, rights asserted in the action" which are not mere steps toward the final decision into which they merge, "too important to be denied review," and "too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546. But the issue of Grucon's responsibility for the allegedly defective sprinklers is not collateral to the litigation Grucon believes to be imminent. While the issue of the CPSC's jurisdiction may be independent of the question of the safety risk posed by Star's sprinklers, more is necessarily entailed in any CPSC proceeding than the existence of a defect. The CPSC's determination of whether Grucon is responsible for the manufacture of Star products bears directly and crucially on any ruling it might make against Grucon. The action against Grucon by the CPSC is everything *Cohen* requires it not to be: it is one step toward the final judgment, an ingredient in that judgment, and relating to an issue which will merge into the judgment. Hence reliance on *Cohen* is misplaced.

Finally, Grucon cannot advance any persuasive argument for the use of this court's discretion under the Declaratory Judgment Act. To do so, Grucon would need to show more than the mere burden of litigation. In virtually every circumstance where any of these doctrines apply, the party seeking to invoke the court's jurisdiction will be faced with the prospect of litigation. If such prospect sufficed as inequitable hardship or as a deciding factor in the court's use of discretion, it would make the requirements obsolete. The autonomy of agencies, the time of courts, and the preference for trying issues together in one forum, all weigh too heavily to be overcome so easily.

Since no sufficiently adverse agency action has become final, Grucon may not avail itself of the APA to confer a cause of action and a waiver of sovereign immunity. Without these ingredients, this court does not have jurisdiction and has no choice but to dismiss Grucon's complaint and this action.[6]

[6] Because, for the reasons expressed, the court has dismissed this action, there is no need to address the Constitutional question of whether Grucon has presented an Article III case or controversy.

III. CONCLUSION AND ORDER

For all of the foregoing reasons, the defendant's motion to dismiss for lack of subject matter jurisdiction will be granted and this action will be dismissed without prejudice.

NOW THEREFORE IT IS ORDERED that the defendant's motion to dismiss be and hereby is **GRANTED**;

IT IS FURTHER ORDERED that this action be and hereby is **DISMISSED WITHOUT PREJUDICE**;

IT IS FURTHER ORDERED that the United States District Court Clerk enter final judgment accordingly.

SO ORDERED this 18th day of September, 2001, at Milwaukee, Wisconsin.

WILLIAM E. CALLAHAN, JR.
United States Magistrate Judge